IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHIN HING,
Appellant,

vs.

HENRY M. WHITE, as Commissioner of Immigration at the Port of Seattle, Washington, for the United States Government,
Appellee.

No. 2651

In the Matter of the Application of CHIN HING, for a Writ of Habeas Corpus.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HON. JEREMIAH NETERER, *Judge.*

Brief of Appellee

CLAY ALLEN,
United States Attorney.
GEORGE P. FISHBURNE,
Assistant United States Attorney,
Attorneys for Appellee.

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STATEMENT OF THE CASE.

The appellant herein, by his attorney, filed in the United States District Court for the Western District of Washington his petition asking that writ of habeas corpus issue out of that court. The peti-

tioner alleged, among other things, that he was an applicant for admission into the United States and that for that purpose had applied to the Commissioner of Immigration at the Port of Seattle, and upon hearing before the Commissioner had been denied admittance and was then imprisoned at the detention house in Seattle awaiting deportation under order of the Commissioner of Immigration. From this order of deportation an appeal had been taken to the Secretary of Labor. The appeal so made was heard before J. B. Densmore, then Solicitor of the Department of Labor and at the time performing the duties of Assistant to the Secretary of Labor. The action of the Commissioner was upon this appeal affirmed by Mr. Densmore, acting for and on behalf of the Secretary of Labor. The petitioner had also filed herein, upon stipulation, his amended petition, and in this amended petition relief was asked against the unlawful action of the immigration authorities in the following particulars:

It was there claimed and it is one of the contentions made by the appellant herein that J. B. Densmore, as Solicitor of the Department of Labor and in the performance of the duties of the Secretary of Labor and his Assistant, was not authorized under the law to hear or pass upon the appeal of the petitioners. It is further alleged in the petition and the

amended petition that the Secretary of Labor and his Assistant were not then actually absent from their posts of duty at Washington and that no duty of the kind or character attempted to be performed by Mr. Densmore on the occasion could be performed by him except in the case of the entire absence of these two officers.

Upon the filing of the original petition an order to show cause was issued against the Commissioner of Immigration and Henry Monroe, Chinese Inspector, directing them to appear and show cause why the application for writ should not be granted and restraining the Commissioner and Inspector from deporting and removing said petitioner from said district or carrying into effect any warrant for his deportation which might be held by them.

Returns and answers to the petition and amended petition were severally filed.

At this time action had been taken by Mr. Densmore but no action had been taken by the Secretary or Assistant Secretary personally with reference to the appeal. An application was then made for a commission to take the deposition of Louis F. Post, Assistant Secretary of Labor, counsel seeking to furnish proof of his allegation as to the position of these officers at their post of duty at the time the appeal was heard by Mr. Densmore. A commission

was issued and, pending the return of this commission, the appeal was submitted to the Secretary of Labor himself and he thereupon concurred in the finding of Mr. Densmore, and directed the deportation of the petitioner. Upon petition then filed in the District Court for the Western District of Washington, reciting these facts, Judge Neterer directed that the commission to take the deposition of Mr. Post be recalled and thereupon dismissed the petition of the appellant.

The complaint of petitioner here assumes a dual form: He complains that Mr. Densmore, as Solicitor and Acting Secretary, had no authority to pass upon the appeal and that the trial court had no authority to entertain evidence as to the action of the Secretary himself occurring subsequent to the filing of the original petition.

It is apparent that if Judge Neterer's position in permitting the amendment was right, no decision on the first question will be necessary.

ARGUMENT.

Statute and Its Interpretation.

The statute provides as follows:

> "In every case where an alien is excluded from admission into the United States under any law or treaty now existing, or hereafter

made, the decision of the appropriate customs or immigration officer, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of the Treasury. 28 Stat. 390."

Under this statute it was held in the case of *United States v. Gin Fung*, 100 Fed. 389, that

> "The circuit court has no jurisdiction of habeas corpus proceedings brought by an alien excluded by the collector of the port to determine his right to land, since the collector's determination is not reviewable by the courts, but only on appeal to the Secretary of the Treasury."

Again the Supreme Court passed on the same point in the case of *Lee Lung v. Patterson*, 46 L. Ed. 1108-10, 186 U. S. 169, 175, in which case the court, at pages 174-175 uses the following language:

> " 'These cases establish the doctrine that the collector of customs, in determining the right of Chinese persons to land, may act upon his own information and discretion, and that such action, however taken, is conclusive of the matter, subject to the right of appeal to the secretary of the treasury; that his decision, if he decides not to hear testimony, or not to give effect to evidence which the laws of Congress have provided shall be sufficient to establish the right to land in the first instance, or decides not to decide, is conclusive. Under the doctrine of these cases, it is immaterial, so far as the jurisdiction of this court is concerned, whether the petitioner's appeal to the Secretary of the Treasury is

heard by the Secretary in person or by a subordinate official in his department, or is heard at all.'

It was decided in *Nishimura Ekiu's Case* that Congress might intrust to an executive officer the final determination of the facts upon which an alien's right to land in the United States was made to depend, and that if it did so, his order was due process of law, and no other tribunal, unless expressly authorized by *law* to do so, was at liberty to re-examine the evidence on which he acted, or to controvert its sufficiency. This doctrine was affirmed in *Lem Moon Sing v. United States*, 158 U. S. 538, 39 L. ed. 1082, 15 Sup. Ct. Rep. 967, and at the present term in *Fok Young Yo v. United States*, 185 U. S. 296, *ante*, 917, 22 Sup. Ct. Rep. 686, and *Lee Gon Yung v. United States*, 185 U. S. 306, *ante* 921, 22 Sup. Ct. Rep. 690."

In re Lee Lung, 102 Fed. 132, 134, the Court uses substantially the same language, at page 134.

Court No Jurisdiction Unless Commissioner Reversed on Appeal.

This habeas corpus decision is not an appeal from the Commissioner to the District Court. No such procedure is permissible. Under the doctrine laid down in the foregoing cases no court will permit itself to interfere with the orderly progress of a matter of this kind in the hands of administrative officers. If the contention of counsel for the appel-

lant is correct, that the decision of Mr. Densmore was in fact a nullity and that no lawful decision upon the Chin Hing appeal was made as a result of his action, the case must be deemed as still pending upon appeal and as yet undecided.

Now, if there is no appeal in effect the court has no jurisdiction, because the Commissioner's decision is final, even in a court of justice until reversed on appeal to the Secretary of Labor; but if it is still pending on appeal the Secretary of Labor still has the right to render his opinion in the case and it comes with bad grace from the petitioner and appellant to object to the action of the Secretary when the sole ground of his petition for his writ of habeas corpus was the fact that the Secretary did not take this action.

The very petition itself shows that the immigration authorities still have jurisdiction and that the matter is still pending before them and that the time limit has not expired for the deciding of the appeal, and no injunction, execution or order of a court of record has suspended the action of the said immigration authorities.

The statute settles the law, because Commissioner White's decision is final unless reversed. Even if the wrong officer affirmed Commissioner White's decision, the Court could not say that he was re-

versed; but if the Court should take the view adopted by Judge Dooling in the case referred to in appellant's brief, *In the matter of the Application of Quan Wy Chung upon behalf of Tsuie Shee, his wife, and Quan Wy You, his son, for a Writ of Habeas Corpus*, decided October 23, 1914, by Judge Dooling, not reported, that the Secretary of Labor or his Assistant must review the appeal, it would be logical to follow the Judge all the way through.

It will be observed that though the Judge held that the Secretary or his Assistant should should review the case when present in the office, he stated (page 4 of decision),

> "This being the first time that this question has been presented to the court, the petitioners were not discharged, but it was ordered that their deportation be stayed until their appeal had been heard and determined by competent authority, and if such appeal was not so heard and determined within fifteen days from October 5, 1914, that they might apply to the court for further relief."

And even though the Department refused to review the decision through the proper officer according to his order, yet Judge Neterer still refused to release the alien, and said that the case was still pending on appeal at Washington, and follows the conclusion of Judge Gilbert in the *Way Tai* case. Judge Neterer says:

"But it does not follow from this that the petitioners here are entitled to an absolute discharge. As said by Judge Gilbert in the case of *Way Tai*, 96 Fed. 484: 'If the assistant secretary had not the authority to hear and determine the appeal, the appeal has not been disposed of, but is still pending, and the detention of the petitioner by the officer to whom he was intrusted until the disposition of his case on appeal, is not unlawful.'

"The department, however, while still holding the petitioners in custody for deportation, is apparently indisposed to have the appeal heard by any one whom the court believes to be authorized to hear it. The court is not disposed to land these aliens when the local officers have decided against their right to land, and while in the language of Judge Gilbert above quoted their appeal is still pending."

The Court will find the quotation from the *Way Tai case*, made by Judge Gilbert, in 96 Fed. 486, near the bottom of the page, and will see that that decision absolutely upholds him.

There is no distinction between that case and this. A petition for habeas corpus determines whether or not the petitioner is in the legal custody of the immigration authorities. This does not suspend the appeal. It leaves the case of the Chinaman in statu quo and if the immigration authorities desire to make further orders therein they can do

so. There is no injunction by the court to stop them.

In this case the authorities at Washington evidently decided that Judge Dooling might be right and they would not contest the point, and so they said we will get the proper man to review this case and rectify the alleged injustice done to the petitioner.

We do not see why this Court should wait until the depositions come back from Washington and then determine whether or not the Secretary of Labor or his Assistant should hear the appeal, and then if he should rule that the Secretary or his Assistant should hear the appeal, continue the case as Judge Dooling did for fifteen or thirty days until said Secretary or Assistant could give exactly the same decision which we are offering in evidence.

By the action of the Secretary of Labor in deciding this case in person, all the questions raised in the petition are moot questions.

We know of no stronger argument than a quotation from the able decision of the court below, where the Judge uses the following language:

> "I do not think that the position of counsel for the petitioner is tenable. It is highly technical and would not lead to any conclusion of the rights of the petitioner in this controversy. The petitioner in this case could not hope to be

released from custody and permitted to unlawfully enter the United States while his appeal was pending before the Secretary of Labor. If the contention is correct that the 'Acting Secretary' was not clothed with authority by reason of the presence of his superiors qualified to act, then the appeal had not been heard and the threatened deportation of the petitioner was simply premature, and the most that the petitioner could hope for would be a delay of the deportation until the proper officer of the department could determine his appeal. The record discloses that the Secretary of Labor did personally determine this appeal and adversely to the petitioner. The Secretary of Labor having acted, the reason for the disclosure sought by the desposition and interrogatories of the Assistant Secretary of Labor is disposed of. There is nothing at issue, and I think the Commission to take the said deposition should be recalled. Courts are not organized to do idle things, but to determine issues presented, decreeing to the respective parties the rights as law or equity may direct. The entire record now being before the Court, the Court should consider the record now and determine the respective rights of the parties. The Secretary of Labor having personally reviewed the decision of the Commissioner of Immigration, it is unnecessary to examine into the right of the 'Acting Secretary' in the premises."

Objection that Record Not at Washington When Secretary Reviewed Decision.

It was strenuously argued by the attorney on the other side that the Secretary of Commerce and

Labor could not have considered this case on appeal because we had the original record filed and made an exhibit in this cause.

The practice in these cases is that the Immigration Office makes out a duplicate record, the original and the copy both being considered originals by the Department. When we make the record a part of our return we always use what would be a carbon copy, according to state practice, but what according to the Immigration Office is considered one of the originals.

In this case we used the carbon copy which was at Commissioner White's office, and the original of this carbon was in Washington. If the Court thinks it necessary we can call this a copy and we will ask the Court that we may amend our Return by inserting between the words "that" and "the record" in line 15, on page 2, the words "a copy of."

The Court will see that this is the case by reading the second paragraph in the letter on page 101 of the Transcript of Record, which is as follows:

> "As this case was decided upon the record as submitted by you, and as you have been furnished a copy of the Bureau's memorandum which was approved by the Department, it is not considered necessary to forward you the record certified by the Department. You can use your own copy in making return to the writ."

And also by the words on page 54 of the Transcript of Record occurring in the decision offered in evidence by the government as exhibit 'B" in the following language:

> "It is believed that the inclosed will serve your purpose, without withdrawing from the Bureau's files the entire record, of which you already possess a complete copy with the exception of the notation on the memorandum of the Secretary's approval."

Amendments in Trial Court.

It is believed that the contention of counsel that the trial court should not have permitted the action of the Secretary of Labor, occurring subsequent to the institution of the suit, to be interposed as a defense will give this Court no great concern. The rule that the trial court shall be granted the most extreme latitude in the control of the issues and parties to the suit to the end that substantial justice may be administered, is one too firmly established to scarcely require the citation of authorities.

Section 954 of the Federal Statutes Annotated, Volume 4, page 596, reads as follows:

> "No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall

> proceed and give judgment according as the right of the cause and matter in law shall appear to it, without demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."

The foregoing section has been variously construed from time to time as giving the widest latitude to the trial court in the control of any of the issues before him. As was said in the Supreme Court in the case of *Neale v. Neale*, 9 Wallace 1, 19 L. ed. 590:

> "Rules of pleading are made for the attainment of substantial justice, and are to be construed so as to harmonize with it if possible."

Foster's Federal Practice, Volume 1, page 716, lays down the following rule:

> "Where state practice is silent, amendments at common law will usually be allowed in cases in which they would be allowed in equity, and they have the same effect."

The equity rule permits,

> "The Court may at any time in furtherance of justice, upon such terms as may be just,

> permit any process, proceeding, pleading or record to be amended, or material supplemental matter to be set forth in an amended or supplemental pleading."

Montgomery's Federal Procedure declares,

> "The matter (of amendment) is entirely within the discretion of the court, and not reviewable except when there has been a gross abuse of discretion."

citing *Lang v. Union Pacific R. R. Co.*, 126 Fed. 340.

Section 914, page 563, Volume 4, Revised Statutes Annotated, provides that in actions at law the federal courts shall conform to the practice of the state of the district.

The practice in the State of Washington is clearly defined by statutes. Section 303 of *Remington & Ballinger's Code*, Volume 1,page 301, provides as follows:

> "The court may, in furtherance of justice, and on such terms as may be proper, amend any pleadings or proceedings, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, upon affidavit showing good cause therefor, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars, * * *."

The exact situation found in the case at Bar is provided for in Section 308 of *Remington & Ballinger's Code*, page 307, which reads as follows:

> "The court may, on motion, allow supplemental pleadings showing facts which occurred after the former pleadings were filed."

The practice is well established in the State of Washington that amendments may be permitted even to the extent of admitting new parties at the time of trial.

> *Townsend v. Three Lakes Lumber Co.*, 67 Wash. 654, 122 Pacific 29.

The attention of the Court is called to the case of *Manitowoc Malting Co. v. Fuechtwanger, et al.*, 169 Fed. 983. In this case plaintiff asked for damages in the sum of $10,000 and the jury returned a verdict for $21,664.54. After the verdict was returned motion was made to amend the complaint to conform with the verdict returned. The Court granted the motion and discussed quite at length Section 954, of the Revised Statutes, above quoted, holding that it gives the widest latitude to the trial court in the proceedings before him. At page 986 the Court cites many authorities in suport of its position.

> See also *United States v. Buford*, 3 Peters, 12, *Jackson v. Ashton*, 10 Peters 480.

While it is believed that this Court will not consider the question as to the regularity of the action taken by Mr. Densmore for the reasons hereinbefore given, it is thought best to call the Court's attention to certain sections that may directly bear upon the contention of counsel. It is the position assumed by the appellee that the trial court has full power to permit any amendment or the introduction of any additional evidence which would assist in arriving at a proper conclusion in the matter. If this power is conceded, then the action of the Secretary has finally made this conclusive, whatever may be the result of the action by the Solicitor in the first instance. In other words, if the Court had full power to permit an amendment to the return and the offer of additional evidence, and the procedure was otherwise regular, nothing remains for the Court to do but to remand the prisoner to the cutsody of the Commissioner.

In addition to the several sections referred to by counsel, attention is called to the following sections of the federal statutes:

Act of March 4, 1913, page 243 of Federal Statutes Annotated,

> "That all laws prescribing the work and defining the duties of the several bureaus, offices, departments or branches of the public service by this Act transferred to and made a part

of Department of Labor shall, so far as the same are not in conflict with the provisions of this Act, remain in full force and effect, *to be executed under the direction of the Secretary of Labor.*" (37 St. at Large 738.)

Section 161, page 58, Volume 3, Revised Statutes Annotated, provides,

> "The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it."

See *Shillito Co. v. McClung*, 51 Fed. 868-872, in which it was held that,

> "The Secretary of the Treasury could have assigned to the Assistant Secretary or Secretaries of the Treasury Department the duty of deciding appeals from assessments made by collectors of customs duties; * * * The reply does not negative the fact that the Assistant Secretary was not assigned by the Secretary of the Treasury to the performance of the duty of deciding the appeal, nor that there was no absence or sickness of the head of the department which devolved the duty upon the Assistant Secretary. Under such circumstances, is the want of authority to be assumed, or will the law raise a presumption to the contrary in support of the official act? *We are clearly of the opinion that the latter is the rule to be applied.*"

The Circuit Court, of which Ex-President Taft was then a member, cites the case of *United States v. Peralta*, 19 Howard 347, 15 L. ed. 678, in which it was held,

> "The public acts of public officials purporting to be exercised in an official capacity, and by public authority, shall not be presumed to be usurped, but that a legitimate authority had been previously given or subsequently ratified. To adopt a contrary rule would lead to infinite confusion."

The case of *Chadwick v. United States*, 3 Fed. 756, adheres to the same doctrine, suggesting:

> "Nothing appearing to the contrary, the legal presumption is that the certificate was made in pursuance with a lawful authority. * * *."

See also *United States v. Adams*, 24 Fed. 348-351. In *Parish v. United States*, 100 U. S. 500, 25 L. ed. 763, it was held that the action of the Assistant Surgeon General at St. Louis was in effect the action of the Surgeon General at Washington. The Court there points out how impossible it is "for a single individual to perform all the duties imposed upon him by his office."

It would seem in the case at Bar that where the Federal Congress has provided a trained legal advisor, qualified to respond with legal opinions, and

the Federal Congress has granted to both the President and the Secretary of Labor the power to define the duties and assign the respective duties of the various subordinates, that it was intended and expected that duties would be assigned to the legal advisor of the kind which he is qualified to perform.

We believe that the action of Mr. Densmore, the Solicitor, was legal and valid. Nothing occurs in the record except the allegation of the pleader that the Secretary and Assistant Secretary were not absent at the time of the action taken by the Solicitor. As suggested in the foreging cases,the presumption is in favor of the legality of the action taken.

It is submitted that the judgment of the lower court should be affirmed.

Respectfully submitted,

CLAY ALLEN,
United States Attorney.

GEORGE P. FISHBURNE,
Assistant United States Attorney.

Attorneys for Appellee.